

three years without any limitation on the extent of the broadcaster's liability, especially since the amount of that liability depends on factors outside the knowledge or control of the broadcaster.

While no cable party appears to take issue with this justification,^{3/} cable interests oppose NAB's one year proposal on the grounds that it would contravene the three-year election period, and would allow stations to opt in and out of must carry. These objections are without merit.

In its *Clarification Order*,^{4/} the Commission made it unequivocally clear that stations do *not* lose their must carry rights from a failure to resolve signal quality or copyright problems by any particular date within a three year election period, and that "where the station does not initially meet the criteria for must carry status, it subsequently may assert its rights once it satisfies the conditions for must carry status."^{5/} Hence, the Commission correctly concluded that the three year period of a station's must carry election has no bearing on when it can, or might, be able to take the steps

^{2/} (...continued)

ation Of Broadcasters, MM Dkt. No. 92-259 filed May 3, 1993 (hereinafter "NAB Petition") at 10-11.

^{3/} Indeed, United Video acknowledged that ". . . because of the regulatory uncertainty on so many issues relating to future copyright payments, as well as the complexity of the copyright payment calculations, there will remain some degree of risk and unpredictability regarding copyright payments." Opposition of United Video, Inc. To Petitions For Reconsideration, MM Dkt. 92-259 ("United Video Opposition") filed June 7, 1993 at 4.

^{4/} *Clarification Order*, MM Dkt. 92-259, FCC 93-284 (released May 28, 1993).

^{5/} *Id.* at ¶¶ 3, 13, 15. ("We reiterate our clarification that broadcast stations may assert their carriage and channel positioning rights at any time so long as they have not elected retransmission consent." *Id.* at ¶ 15.)

necessary to perfect its must carry rights. NAB's one year indemnification proposal is totally consistent with this conclusion.

The necessity for adopting NAB's proposal is made apparent by the hypothetical posed in United Video's Opposition in which a station subject to an indemnification agreement that was reimbursing a cable system as a permitted signal at .563% of gross receipts in year one of the agreement, suddenly might be recategorized as a non-permitted signal and be required to reimburse at 3.75% of gross receipts in years two and three of the agreement. The difference in the amount the station might have to pay to a large system could be hundreds of thousands of dollars. There is no basis for requiring a station to make a three year indemnification commitment under these circumstances.

The need for a one year rule is further evidenced by a TCI request for indemnification recently received by a station, a copy of which (along with similar requests from Time Warner and Adelphia) is attached hereto as an Appendix. First, the request demands a three year commitment, but recites numerous factors, such as headend reconfigurations and changes in service offerings and/or prices that might result in unspecified increases in copyright liability that the station would be required to absorb. Second, TCI demands execution of a three year agreement, even though no copyright liability currently exists, in the event that changes TCI may later make result in copyright liability, *and* requires a performance bond for this unspecified possible future liability. Even if the Commission does not adopt NAB's one year

proposal, it is imperative that it clarify that stations need not agree to indemnify cable systems unless and until copyright liability actually will be incurred.

NAB's one year proposal would not impose undue hardship on cable opera-

sated for public performance of their works. Until the Copyright Office requires a security deposit or advance payment from cable systems, broadcasters should not be required to provide them to cable operators.

C. Guidelines Are Needed Regarding The Calculation of Stations Copyright Reimbursement Obligations

NCTA, Time Warner, and United Video opposed NAB's suggested solutions to the potentially serious problem of a cable operator manipulating its copyright reporting to attribute radically higher royalty payments to a broadcaster seeking to enforce its must carry rights. NCTA takes the position that, because copyright royalties are payable under a statutory formula, there is no threat that an operator will manipulate the process to charge broadcasters more than their fair share. Because of the way copyright payments are calculated, however, cable operators can arbitrarily attribute royalty status to particular stations that shifts hundreds of thousands of dollars in royalty obligations. Far from charging broadcasters their "fair share," giving cable operators unfettered discretion to manipulate this process will provide them with a windfall opportunity to fund a substantial portion of their current copyright liabilities on the backs of broadcasters exercising must carry rights. Such manipulation is possible in two areas -- deciding whether to report a signal as being subject to the 3.75 percent royalty rate, and, deciding whether to report the station at the rate of .893 percent, .563 percent, or .265 percent.

With respect to the 3.75 percent rate, many stations are simply not subject to that rate because they would be considered "permitted stations" for any of a variety of reasons (*e.g.*, that they are a religious or foreign-language "specialty station;" that

they are a commercial UHF station whose Grade B contour covers all or part of the cable system; or that they were carried before adoption of the FCC distant signal limits). If a station does not fall within one of these categories, however, the cable system could still designate it as a non-3.75 signal under the market quota rules. That is, if a cable system's market quota is two distant independent stations, and it carries three distant independent stations that are not "permitted signals" for other reasons, it may designate two of the three distant signals as "permitted" and thus subject to radically reduced copyright royalty rates. If a system has previously reported a within-ADI station as one of its two market quota stations, allowing it simply to redesignate that station and demand reimbursement at the 3.75 percent rate would produce an unfair and unwarranted windfall.

Similarly, allowing cable operators complete freedom to designate which *non*-3.75 rate a particular must carry station is carried at would allow them to collect more from those stations than the *increased* royalty amount actually resulting from their carriage. The Commission should make clear that only the lowest incremental rate actually paid for any distant signal may be sought in reimbursement agreements. NAB's proposal to provide for averaging of rates, in cases where a number of non-3.75 stations are carried pursuant to reimbursement agreements and more than one rate is involved, was intended to avoid the potential undercompensation problem NCTA identifies (Opposition at 4) while also avoiding an unintentional disincentive created by the Commission's "order of carriage" rule.

The Commission should adopt NAB's proposals on copyright reimbursement in order to ensure that cable operators are made whole but are not granted windfalls at broadcasters' expense.

II. Carriage of Stations Electing Retransmission Consent From June 17 to

The result sought by NCTA and Time Warner would instead have the effect of leaving stations with no rights whatever between June and October. While stations electing must carry would keep the carriage rights which took effect on June 2, stations could be dropped or repositioned by cable operators, subject only to the 30-day notice requirement. Congress certainly did not intend to allow such a gap in its carefully constructed system of carriage rights. The Commission, therefore, should make clear that *all* stations retain their must carry status through October 5.

III. Channel Positions for Stations Which Do Not Make an Election

NCTA (Opposition at 5-6) and Time Warner (Opposition at 5-7) also oppose NAB's contention that cable systems must provide stations which do not make a specific election on June 17 with one of the three channel position options provided in the Cable Act. They argue instead that cable operators should be free to place these stations on any channel position of their choice.

That position is untenable. The Commission concluded that stations which do not elect will be deemed to be must carry stations. This was the appropriate choice since one of Congress' goals was to ensure the widest distribution of local over-the-air signals. The Cable Act provides that *all* must carry signals will be carried on specified channel positions, and there is no basis for carving out an exception once the Commission concluded that the default election is must carry.

NCTA argues that according these stations any channel positioning rights is unfair because they allegedly "do not care enough about cable carriage to express any interest in it." A station is just as likely to fail to make an election on a particular

system, however, due to an oversight.^{6/} There is no basis, therefore, to assume that the failure to make an election bespeaks a lack of interest or attention.

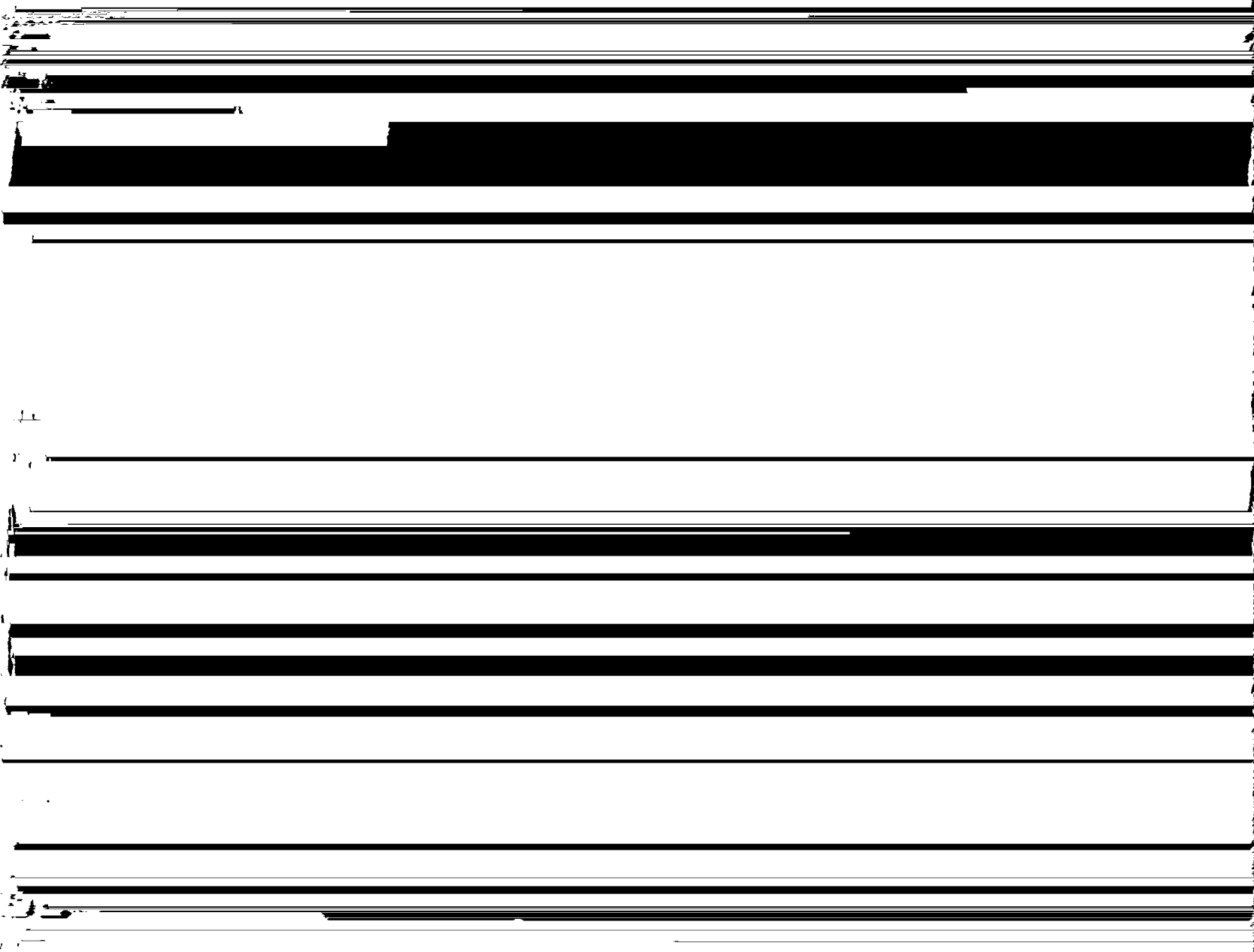
Time Warner suggests that providing some channel positioning rights for these stations would be burdensome because those rights might conflict with the channel positions selected by other must carry stations. Since the cable operator under the Act would have the choice of placing these stations on one of *three* channels, the chances that all of those channels would conflict with the choices made by other must carry stations are infinitesimal. The Commission should, therefore, require that all must carry stations be afforded channel positioning rights.

IV. Cable Systems Should Continue to Carry Stations in the Event of Disputes About Signal Quality

Time Warner (Opposition at 11-13) points out that the *Clarification Order* did not explicitly require cable systems to continue carriage of signals already on the system during the pendency of a dispute over a cable operator's claim that the station does not provide a signal of adequate strength. In paragraph 13 of that *Order*, the Commission stated that "We believe that it is unlikely that a signal that is currently carried by a cable system does not deliver a good quality signal to the principal headend. Thus, we believe that few questions will be raised regarding the continued carriage of such stations" Time Warner disputes the Commission's conclusion

^{6/} A large number of cable systems apparently did not send notices to local stations on June 2 as required by section 76.58(e) of the Rules, and stations, particularly in large ADIs, which legitimately planned to rely on those notices to identify the cable systems for which an election is required may accordingly miss some cable systems.

that there will be few situations in which signal quality disputes occur in connection with stations already carried, apparently because, contrary to the conclusions in the *Clarification Order*, Time Warner continues to believe that it is not required to continue using the equipment it has in place to receive broadcast signals. Because it seems clear that operators like Time Warner may seek every opportunity to frustrate the implementation of must carry, the Commission should rule that stations that have



APPENDIX



TCI Cablevision of Alabama, Inc.

June 1, 1993
Lee Brantly
WAFF
1414 N. Memorial Parkway
Huntsville, AL 35801

Dear General Manager:

We notified you earlier that potential Copyright increases may impact the must carry rights of WAFF on the Red Bay, AL system. As you know, our business is not static. While the current headend configuration is such that we would not immediately incur additional Copyright fees for carriage of WAFF we cannot be certain that such would continue throughout the term of your must carry election period (1993 - 1996).

Factors that could affect this are headend consolidations, which are ongoing, as we integrate our systems with fiber, internal growth and/or acquisitions. Therefore, Copyright costs may increase over time for a variety of reasons, including changes to our service offerings and/or prices.

You would need to indemnify TCI of North Mississippi for any Copyright increases associated with carriage of your signal during this period, knowing that the specific increase cannot be identified at this point.

As to the signal quality aspect, I would like you to discuss/meet with the Area General Manager, Greg Butler, so we can jointly agree on what specific steps you propose to provide a good quality signal and the timing of such.

If you wish to proceed with this, we will ask you to sign an indemnification agreement in the form attached, provide a performance bond, letter of credit or other appropriate financial instrument before WAFF is added to the system. If you are in a position to do so, we will, in turn, attempt to provide adequate notice to you, where possible, in advance of actually incurring additional Copyright, which should allow you time to select where continued carriage is desired by WAFF in light of the Copyright liability. Absent this arrangement, we would be unable to add your television station to our system in the immediate future.

I'm available to discuss the particulars of this with you at your convenience.

Very truly yours,

Earl T. Hines

Earl T. Hines

tj

Attachment

Time Warner Cable of Reedsville

PO. Box 129
Marietta, PA 17547
1-800-372-7749
Fax * (717) 684-0383

June 10, 1993

Gary A. Stewart
WKBS-TV
Cornerstone TeleVision, Inc.
Well, PA 15148

Dear Mr. Stewart,

I am responding to your May 28th letter concerning copyright liability for carriage of WKBS on the Reedsville (Mifflin County, Pennsylvania) cable system.

Enclosed is a copy of the copyright statement for the period of July 1 to December 31, 1992 for the Reedsville system. This system currently files the "short form" (indicating service revenues of less than \$292,000). As the royalty fee calculations are not based on carriage of distant broadcast signals the carriage of an additional distant independent station would not increase the royalty fee at this time.

Please be advised that if system revenue would increase to greater than \$292,000 for a six month period, carriage of WKBS could result in additional copyright liability of .563% of total revenues, or more than \$1600 semi-annually. This percentage is the rate from the "long form" for the second permitted distant independent signal. We would advise you if the system's revenues are projected to exceed \$292,000.

If WKBS is carried on the Reedsville system, your station will need to indemnify us in writing for any additional copyright royalties for as long as WKBS remains on the system, even though at the present time there appears to be none. I believe your other questions will be answered by information contained in the enclosed copyright statement.

Sincerely,



Bruce Shaak
Programming Manager

cc: Ron Amick, Karen Baxter, Dan Wynn



AK
ADRIANA

received 6/14/93

Certificate of Service

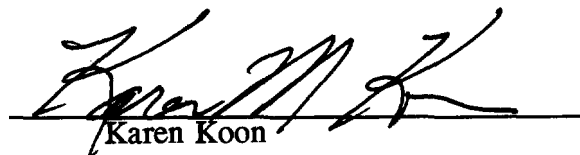
I, Karen Koon, hereby certify that I have, this 17th day of June, 1993, caused to be sent by mail, first class postage prepaid, copies of the foregoing "Reply of the National Association of Broadcasters" to the following:

Daniel L. Brenner, Esquire
Michael S. Schooler, Esquire
Diane B. Burstein, Esquire
National Cable Television Association
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Robert D. Joffe, Esquire
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019

Brian Conboy, Esquire
Theodore Case Whitehouse, Esquire
Willkie, Farr & Gallagher
Three Lafayette Center
1155 21st Street, N.W.
Washington, D.C. 20036

Mr. Jeff Treeman
President
United Video, Inc.
3801 S. Sheridan Road
Tulsa, Oklahoma 74145



Karen Koon